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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID MATTHEW DELGADO,

Defendant and Appellant.

E045239

(Super.Ct.No. INF048290)

OPINION

APPEAL from the Superior Court of Riverside County. Richard A. Erwood,
Judge. Affirmed as modified.

Judith Kahn, under appointment by the Court of Appeal, for Defendant and
Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Gary W. Schons, Assistant Attorney General, and Pamela Ratner
Sobeck and Ronald A. Jakob, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant guilty of first degree murder (Pen. Code, § 187, subd. (a))¹ (count 1) and assault with a deadly weapon by means of force likely to produce great bodily injury (§ 245, subd. (a)(1)) (count 2). The jury also found true that defendant committed both offenses for the benefit of, at the direction of, and in association with a criminal street gang (§ 186.22, subd. (b)) and that a principal personally and intentionally discharged a firearm proximately causing death in the commission of count 1 (§ 12022.53, subds. (d) & (e)(1)). Defendant was sentenced to a total term of 66 years to life in state prison. On appeal, defendant contends the 10-year gang enhancement attached to the murder conviction must be stricken; the People argue that the trial court erred in imposing one year on count 2. We agree with the parties and will modify the judgment accordingly.

I

DISCUSSION²

A. *Ten-Year Gang Enhancement Attached to Count 1*

Defendant contends the 10-year gang enhancement imposed for the first degree murder count pursuant to section 186.22, subdivision (b)(1) should be stricken, because the enhancement does not apply where a defendant is sentenced to a life term. He relies

¹ All future statutory references are to the Penal Code unless otherwise stated.

² The details of defendant's criminal conduct are not relevant to the limited issues raised in this appeal. Those details are set out in the parties' briefs, and we will not recount them here. Instead, we will recount only those facts that are pertinent to the issues we must resolve in this appeal.

on section 186.22, subdivision (b)(5), which states in relevant part that “any person who violates this subdivision in the commission of a felony punishable by imprisonment in the state prison for life shall not be paroled until a minimum of 15 calendar years have been served.” The People agree.

In *People v. Lopez* (2005) 34 Cal.4th 1002, the Supreme Court held that a defendant found to have committed first degree murder for the benefit of a criminal street gang was not subject to a 10-year enhancement under section 186.22, subdivision (b)(1). Instead, the 15-year minimum parole period under section 186.22, subdivision (b)(5) applied. (*Lopez*, at p. 1011.) The *Lopez* court acknowledged that, since first degree murder is punishable with a term of 25 years to life (§ 190, subds.(a), (e)), applying section 186.22, subdivision (b)(5) to impose a minimum parole term of 15 years “will have no practical effect for first degree murderers” (*Lopez*, at p. 1009.)

Accordingly, because the determinate 10-year gang enhancement under section 186.22, subdivision (b)(1) could not be imposed on defendant, we will strike it as to the murder (count 1) conviction.

B. *Imposition of Sentence on Count 2*

The People contend that a new sentencing hearing must be held because the court imposed an unauthorized sentence. In particular, the People argue that the court failed to impose a “full strength” principal term for the determinate portion of the sentence (count 2). Defendant agrees that a full term should have been imposed on the assault with a

deadly weapon (count 2) conviction but claims a remand is unnecessary, as the court had already selected the middle term on this count.

We first summarize defendant's sentence as described by the court. As to count 1, for first degree murder, the court imposed an indeterminate term of 25 years to life, plus a consecutive term of 25 years to life for the gun use enhancement pursuant to section 12022.53, subdivision (d) attached to that count. The court also erroneously added an additional 10 years for the gang enhancement allegation (see part I.A., *ante*).

The conviction on the remaining count of assault with a deadly weapon (count 2) is punishable by a determinate sentence. (See § 245, subd. (a)(1).) As to count 2, the court imposed one-third the midterm of three years, or one year in state prison. Specifically, the court stated, "With respect to count 2, . . . I'll select the mid term of three years in state prison. That's to run consecutive to that . . . imposed in count 1. So that will be one year consecutive. And I'm selecting the consecutive term because it occurred on a different date and time and involved a separate victim." The court also added a term of five years for the gang enhancement allegation attached to count 2. It stated that these sentences were to run consecutively.

We agree with the parties that the court erred in failing to impose a "full strength" term on count 2. When, as here, a defendant is sentenced to both indeterminate and determinate terms, the two types of terms are considered and calculated independently of the other. (*People v. Garza* (2003) 107 Cal.App.4th 1081, 1094.) Neither is considered to be principal nor subordinate to the other. (*Ibid.*) Under the determinate sentencing

law, a principal determinate term must be selected and a full term for that count imposed. (§ 1170.1, subd. (a).)

The People contend a remand is necessary “for the trial court to select and impose a full strength principal term of two, three or four years for count 2.” Defendant responds since the record is clear the court exercised its discretion in imposing a middle term on count 2, a remand is inappropriate here. We are inclined to agree with defendant.

On review, appellate courts may correct a legally unauthorized sentence. (*People v. Smith* (2001) 24 Cal.4th 849, 852; *People v. Quintero* (2006) 135 Cal.App.4th 1152, 1156, fn. 3.) A legally unauthorized sentence is one which “could not lawfully be imposed under any circumstance in the particular case.” (*People v. Scott* (1994) 9 Cal.4th 331, 354.) The sentence triad for a conviction of assault with a deadly weapon is two, three, or four years. (§ 245, subd. (a)(1).)

Here, the court expressly indicated its intention of imposing the midterm on count 2. The court stated, “I’ll select the mid term of three years” We will therefore direct the trial court to correct the sentencing minute order of February 15, 2008, and the abstract of judgment to reflect imposition of the midterm of three years on count 2. Defendant’s total sentence on count 2 should be eight years: three years for the conviction, plus a consecutive five years for the gang enhancement attached to that count.

II

DISPOSITION

Defendant's 10-year gang enhancement on count 1 is hereby stricken. The judgment is modified to reflect a total sentence of 58 years to life in state prison as follows: 25 years to life on count 1; a consecutive 25 years to life for the gun use enhancement attached to count 1; a consecutive three years on count 2; and a consecutive five years for the gang enhancement attached to count 2. The court shall prepare a new abstract of judgment to reflect the modifications and provide a copy to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

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RICHLI
J.

We concur:

HOLLENHORST
Acting P.J.

McKINSTER
J.